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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 901

GERALD STANLEY SHERMAN and
RICHARD HENRY HOLLAND,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DATED: New York, October 15, 1970.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Gerald Stanley Sherman and Richard Henry Holland, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 10, 1970.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is printed as Appendix A, *infra*.

Jurisdiction

The judgment of the Court of Appeals, Appendix B, *infra*, was entered on August 10, 1970. By order dated August 25, 1970, the time to petition for rehearing was extended to September 16, 1970, Appendix F, *infra*. Petitioners' petition for rehearing, Appendix C, *infra*, was timely filed September 11th, 1970, and denied by order dated September 29, 1970, Appendix D, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Rule 22 (2).

Questions Presented

1. Whether the Trial Court's charge, that under 21 U.S.C. §176a, the jury might presume illegal importation of marijuana from possession, violated petitioners' Fifth Amendment right to due process.

This Court stated that it did not reach the question in *Leary* v. *United States* (1969), 395 U.S. 6, at page 37.

2. Whether the presumption from the fact of possession in 21 U.S.C. §176a, of the importation of marijuana with intent to defraud the United States, violated petitioners' Fifth Amendment right to due process.

The question was not presented in *Leary*, supra, and the Court there stated, 395 U.S. 6, at page 37, footnote 65, that there was no occasion to consider it.

3. Whether the Trial Court's charge, referred to in questions 1 and 2 above, by failing to meet the beyond a reasonable doubt standard, violated petitioners' Fifth Amendment right to due process.

There was no occasion to reach this question in *Leary*, supra, as the Court there noted, 395 U.S. 6, at page 36, footnote 64.

4. Whether the Trial Court's charge that defendants had the obligation of presenting the marijuana to Customs Officers for inspection at the port of entry, and of producing to such Officers an invoice and a sworn declaration thereof, violated petitioners' Fifth Amendment privilege against compulsory self-incrimination.

5. Whether within the meaning of the Fourth Amendment the Customs agents had probable cause, or anything more than mere suspicion, to justify their warrantless search of the car, in an admittedly non-border search.

6. Whether, assuming the existence of probable cause, the warrantless search and seizure of the marijuana from the locked trunk of the car, in the absence of exigent circumstances, deprived petitioners of their Fourth Amendment right against unreasonable search and seizure.

7. Whether the mandatory sentence of five years' imprisonment for petitioners as first offenders under 21 U.S.C. §176a, without possibility of suspension of sentence or probation, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

8. Whether the evidence against petitioner Holland, on the element of possession of the marijuana, was insufficient as a matter of law, rendering the submission of his guilt or innocence to the jury a deprivation of his Fifth Amendment right to due process.

9. Whether the denial of defendants' pre-trial motions for separate trials deprived them of their Fifth Amendment right to due process.

10. Whether forcing petitioners to trial a second time, after the jury at their first trial had been unable to reach a verdict, subjected them to double jeopardy in violation of their Fifth Amendment rights.

Constitutional and Statutory Provisions and Regulations Involved

Questions 1, 2 and 3 involve the Fifth Amendment of the United States Constitution and 21 U.S.C. §176a which are set forth respectively in Appendix E at p. 22a and p. 20a, *infra*.

Questions 5 and 6 involve the Fourth Amendment of the United States Constitution which is set forth in Appendix E, at p. 22a, *infra*.

Question 7 involves the Eighth Amendment of the United States Constitution which is set forth in Appendix E, at p. 22a, *infra*.

Questions 4, 8, 9 and 10 involve the Fifth Amendment of the United States Constitution which is set forth in Appendix E at p. 22a below.

Statement of the Case

Petitioners were convicted by a jury in the United States District Court at Tucson, Arizona, for a violation of 21 U.S.C. §176a. (Illegal concealment and transportation of marijuana).

Originally, the indictment contained two counts. Count II was dismissed before the first trial. There were two trials on Count I, at both of which the facts were closely contested. Petitioners did not testify at either trial. The first trial, March 18, 1969, resulted in a jury disagreement and a mistrial was declared. The petitioners were ordered retried and the second trial, June 4 and 5, 1969, resulted in the convictions now before the Court.

A pre-trial motion to suppress evidence was filed and a hearing on the motion was held pursuant to Federal Rules of Criminal Procedure, Rule 41 (e).

The order denying suppression was accepted by the Trial Court as binding in all respects (R. T. 267)*

The testimony at this second trial was substantially the same as that at the suppression hearing, detailed *infra*, at pp. 7-13, with the addition of expert testimony to identify the marijuana and a palm print of Sherman on one of the wrappings.

(a)

So far as Questions 1 and 3 are concerned.

At the second trial the Court charged the jury, in pertinent part, as follows:

> "I instruct you that when an accused on trial is proved beyond a reasonable doubt to have been in possession of marijuana, as the term possession will be hereafter defined for you, such possession authorizes the jury to draw an inference and to find that the marijuana was imported into the United States of America contrary to law, unless the evidence in the case provides a satisfactory explanation for the defendant's possession of the marijuana.
>
> "The instruction just given does not change the fundamental rule that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, nor does it impose upon the defendant the burden of producing proof that the marijuana was lawfully imported, or any other evidence.

---

* References to the pages of the reporter's trial transcript are preceded by the initials R. T. References to the pages of the reporter's transcript of the suppresion hearing are referred to simply by page number.

"As previously stated, the burden is always upon the prosecution to prove guilt beyond a reasonable doubt. Under the instruction, however, the jury may draw an inference in favor of the United States. Thus if you should find from the evidence beyond a reasonable doubt that there was possession, as that term will be defined to you, on the part of an accused of the marijuana referred to in the indictment, such possession permits an inference that the marijuana was brought into the United States contrary to law. As against that inference, there is the possible contrary inference that the marijuana was not imported contrary to law." (R. T. 378-379).

Exception was duly taken (R. T. 384).

(b)

So far as Questions 2 and 4 are concerned.

The Trial Court further charged the jury as follows:

"I instruct you that all merchandise, including marijuana, imported, into the United States from a contiguous country must by requirement of statute or Customs regulations be declared and presented for inspection to a United States Customs officer at the port of entry or Customs House which is nearest to the place at which the merchandise crosses the border line. Further, certain information concerning the imported merchandise must be supplied to Customs officers and an invoice for the merchandise must be produced. A declaration under oath is required, which declaration states that the information contained therein the invoice and any other document filed with the Customs officials, are true,

"When marijuana is brought into the United States from a foreign country without having been declared and presented to Customs officers for inspection, then such marijuana is brought into the United States contrary to law." (R. T. 375-6).

• • •

"The word 'import' as it is used in the statute and in the indictment in this case means to bring in from one country into another country. An importation is complete within the meaning of the statute and the indictment whenever it is shown that the contraband has been brought into this country from a foreign country." (R. T. 376).

• • •

". . . The indictment also charges that acts alleged to have been done by the defendants were done with the intent to defraud the United States of America. To have an intent to defraud the United States of America it is not necessary that a defendant intend to defraud the United States of a thing of value. One has the intent to defraud the United States of America if he intends to defraud it out of compliance with its Customs laws." (R. T. 377).

Exception was duly taken (R. T. 384-5).

(c)

So far as Questions 5 and 6 are concerned.

At the suppression hearing, the Government admitted that this was not a border search and that it had the burden of proving the legality of the seizure, since "there was no warrant" (5). The Government's proof consisted entirely of the testimony of two witnesses, Everett Turner, a U.S. Customs Port Investigator and Rollin B.

Clink, a U.S. Customs Agent. A third available witness, U.S. Customs Agent Dennis, who actively participated in the surveillance and seizure, was not called. The Government's explanation for not calling him was that it would be 'repetitious' (62).

We regret the length of the following summary. But it raises a question of the presence or absence of probable cause and we see no way to shorten it.

Turner testified as follows:

At 10:30 p.m. on September 30, 1968, Deputy Sheriff Brocamonte of Nogales, Arizona, telephoned Turner, who was stationed at Nogales. Brocamonte told Turner that while out driving he had seen three young men, walking west of Nogales, on Masonic Drive, near St. Joseph's Hospital; that one of the three was a 'hippie' with long hair, that the other two had long hair but not 'too long'; that he had offered them a lift which they refused as unnecessary; and that they told him they were out stargazing and had a car at Denny's Restaurant, in Nogales (6; 17).

Turner described the general locale as follows: Grand Avenue, Nogales, is a port of entry from Mexico, and on either side of it at the point of entry and extending for 3½ miles, east and west, along the international boundary is a ten-foot like chain fence. Thereafter, it becomes a 4 to 4½ foot, 4-strand, barbed wire fence. A half mile northeast of the point where the chain link fence becomes a barbed wire fence, is the Hospital. There is an American road along one side of the boundary fence and a Mexican road along the other. Entrance to the American road is 200 to 300 yards east of the Hospital entrance on Masonic Drive. East and northeast of the Hospital is a residential area. South of the Hospital between it and the fence is barren, open country (6-8).

After the sheriff's phone call, Turner drove into town and on the way received a call on his car radio from a Nogales policeman named De La Osa. De La Osa said he had given a lift to three young men on Masonic Drive near the Hospital; that they told him they had no friends in the area but had a car at Denny's Restaurant and had been out rock hunting; that he had dropped them in front of Denny's and they went in and met two young men in a booth (8-9; 17).

Turner then set up surveillance from a V.F.W. parking lot situated on a high hill overlooking Denny's Restaurant and radiophoned agents Clink and Dennis for help (8-9).

At 12:45 a.m., October 1, 1968, Holland, Sherman and a third unidentified young man left Denny's in a 1968 white Chevrolet which had been parked at the Time Motel south of Denny's. Turner noted the license number, and learned some 15 to 20 minutes later by radio report from the Arizona Highway Patrol that this was a Hertz Rent-A-Car hired at Tucson International Airport (10).

Turner watched the car go north on Grand Avenue, then turn west on Masonic Drive at which point he lost sight of it and radioed Clink and Dennis. The car returned 15 to 20 minutes later with the same three men in it and "was noticeably lower in the rear." (10-11).

The three men parked at the Motel and re-entered Denny's. They remained there 15 to 20 minutes. Then all five came out and talked three or four minutes. Three of them, unidentified, then got into a '65 or '66 Volkswagon parked at the Motel and drove off. Sherman and Holland entered Motel Room 22. Turner thereupon learned from the Motel manager that they had left a call for 9 a.m. that morning (8-12). At 4 a.m. Turner quit his surveillance and went home (18).

Turner stated that Masonic Drive leads off Grand Avenue at a point about a mile and a half from the boundary fence, and runs westward to the Hospital where, at its nearest point, it is a half mile from the fence (22-23). From the highway, i.e., Grand Avenue, the distance west along Masonic Drive to the Hospital is about three miles (22). From the Motel to the Hospital is a 3 to 5 minute drive (25). To walk from Masonic Drive near the Hospital to the boundary fence and back at the nearest point, would take half an hour (23). The Chevrolet car was out of Turner's sight only 15 to 20 minutes (24).

The next morning about 9:30 to 10:00 a.m., responding to a radio call, Turner saw Sherman and Holland standing alongside the Chevrolet on Highway 89 near Milepost 4 outside Nogales (12), with Agents Clink and Dennis. Agent Dennis told Turner the men didn't have the trunk key and the agents "couldn't open the trunk" (12). Turner "opened the back door to search the rear area, the rear interior of the car" and noticed a strong smell of marijuana" (13). He asked Sherman where the trunk key was and Sherman said he didn't have any key to the trunk (14). No proof was offered through Turner or the only other witness, agent Clink, that either defendant then had, or ever had had, a key to the trunk. No proof was offered that the trunk was ever opened by either defendant or in the presence of either except, of course, when the agents thereafter opened it.

Dennis drove the Chevrolet back to Nogales (14). Turner drove his own car back (14). A key was made, the trunk opened and three camping pack sacks were found containing 80 bricks, 150 pounds of marijuana (15). Turner thereupon, "placed them under arrest", warned them, helped take them back to the office and then left for Tucson on other business (15-16).

Turner characterized the area near the Hospital as notorious for the five years he had been in Nogales, for the delivery of narcotics (21), and "estimated" that the narcotics violators arrested in the area since 1966, were 60 per cent hippies (26-27).

Clink testified as follows:

Turner had called Clink about 10:30 p.m., September 30, 1968, and Clink joined him at the V.F.W. hill at 11 p.m. (28). This is a high hill overlooking Nogales. When the three unidentified males (30) left the Motel at 12:45 a.m., Clink and Dennis drove along Noon Street to another high hill overlooking the west side of Nogales. From there, Clink saw the Chevrolet drive westward on Masonic Drive to St. Joseph's Hospital, turn on the Hospital Driveway and come back 200 yards eastward on Masonic Drive and stop (30-31; 45). He did not remember whether the engine shut off (58). A bluff impeded his view from the hill and he could see only the front of the Chevrolet (45; 52). He heard only a single door open and close, and dogs barking. The car was a four-door model (45). He "thought" the driver got out but was not "really sure" (46).

Ten minutes later the car returned eastward on Masonic Drive. Clink and Dennis attempted to follow, then heard from Turner by radio that the car was back pulling in at the Motel. Clink arrived there shortly thereafter, and saw three males get out and walk into Denny's. After 15 minutes five males came out, three drove off in the Volkswagon and the remaining two entered Motel Room 22 (30-32). Clink watched until 4 p.m.; neither of the two males left the room; their light had gone out. He went home, terminating the surveillance (30-32).

About 5 a.m., Clink returned to the surveillance. At 9:15 a.m., the two men left Room 22. One carried a large

suitcase, one a small suitcase. Sherman unlocked the car doors and they put the bags in the rear interior of the car, and drove north on Grand Avenue (33). At no time had he seen either defendant open the car trunk (44). There was nothing suspicious about their driving (55). He notified Turner and Dennis by radio (33).

At about 7:30 a.m. "when the sun was up full" he had noticed that the car appeared to be lower in the rear end (33). He had theretofore said this was about 7:30 or 8:30 a.m. (41; 49; 60); and he could have said 9:30 a.m. (48). He had seen the car pulling into the lot at about 1:20 a.m. (60) and had watched it thereafter until 4:00 a.m., and had not noticed anything unusual about the rear end (50).

Three minutes after Clink radioed, Dennis joined him and they followed the Chevrolet about four miles on Highway 89 to Milepost 5 outside Nogales and stopped it. Dennis advised Sherman and Holland that Clink and he were customs agents and that he "was going to search the car" and asked them to "step out" (34; 56).

Clink then ordered them "to put their hands up alongside the car" and gave them a "body search for weapons" (56; 60-61). Clink stated he did not arrest them (58). Both Dennis and Clink went into the car. Clink took a suitcase out of the rear seat and searched it, finding only a change of clothing. At that time he smelled marijuana and later found a can of air freshner in the glove compartment (34).

He drove (42) or he wasn't sure he drove (57; 61), the vehicle to the Richfield Gas Station in Nogales, taking Sherman with him (57). There a locksmith made a key and they opened a trunk. Marijuana was found therein and he heard Turner thereupon place the two men under arrest (32-35; 36).

There was no search or arrest warrant (56). When he stopped the Chevrolet on the morning of October 1, he "believed" they had marijuana in the trunk (38). Clink first said he did not apply for a warrant because part of his "probable cause did not come until early in the morn- of October 1st" (40). This was the fact that the car was "sitting lower" (41). (Agent Turner had testified he observed this at 1:15 a.m., October 1st (10-11), and that he discussed it with Agents Clink and Dennis at that time (20-21). Clink later changed his testimony and said he did not apply for a warrant because "primarily it wasn't my case. I was not the case officer on this". It was "Turner's case" (58).

Clink expressed the opinion that rental car are attractive for a smuggler (59), and that the area around the Hospital is "frequently used a means to smuggle marijuana" (38; 50).

At the Commissioner's preliminary hearing (Transcript, Preliminary Hearing, p. 39), Agent Dennis testified that when he found out before terminating the surveillance in the early morning of October 1, 1968, that defendants had put in a call at the Motel Office for 9 a.m., he *knew* the agents were going to follow defendants when they left the Motel and stop their car on the road.

(d)

So far as Question 7 is concerned.

Upon the guilty verdict, the court sentenced each defendant to five (5) years imprisonment, as mandated by 21 U.S.C. 176a.

(e)

So far as Question 8 is concerned.

The evidence against Holland in addition to that already detailed supra pp. 7-13 consisted essentially of visas

possessed by him and Sherman, consecutively numbered (Exh. 2 and 2-A), and showing a visit to México on September 27, 1968.

On the other hand, there are the following facts with respect to disproving Holland's possession. Sherman rented the car. Sherman was the only one seen to have or use a key to the car. The marijuana was found in the trunk of the car with Sherman's palm print on it. There was no evidence that the trunk was ever opened in Holland's presence, and there is no evidence that Holland was ever seen to drive the car.

(f)

So far as Question 9 is concerned.

Immediately prior to the commencement of the second trial, a motion for severance on behalf of the defendants was made when it was disclosed by the U.S. Attorney that evidence would be presented that the driver of the automobile, defendant Sherman, had left a palm print on one of the wrappings of the seized marijuana. It was made clear that such evidence involved only Sherman, and that there was no such evidence against Holland. No mention of this print was made at the first trial on March 18, 1969.

Defendant Holland's counsel stated that he first heard of the print only several days before the trial and defendant Sherman's counsel stated that he first heard of it only a few minutes before the trial commenced. The Court stated that it did not see how the joint trial would be prejudicial and denied the motion (R. T. 23-24).

(g)

So far as Question 10 is concerned

The indictment, filed Oct. 8, 1968, originally contained two counts. On Jan. 27, 1969, Count II was dismissed.

Trial on Count I was held on March 18, 1969. After deliberation, the jury reported itself in hopeless disagreement (see Appendix G, *infra*) and was discharged.

On June 4, 1969, the defendants were again forced to trial on Count I. This second trial resulted in the guilty verdict, and judgment, now before the Court (see Clerk's Docket Entries for the foregoing dates.)

Reasons for Granting the Writ

(i)

On Questions 1, 2 and 3

The validity of the presumption in 21 U.S.C. §176a of illegal importation from possession of marijuana was left in question in *Leary* v. *United States* (1969), 395 U.S. 6 in the three aspects raised by our first three questions, and left unanswered in *Turner* v. *United States*, 396 U.S. 398 (1970), insofar as it involved cocaine.

At bar the charge to the jury, already quoted, *supra* p. 5, resolved the three unanswered questions against petitioners. Exception was duly taken (R. T. 384). If the presumption is unconstitutional in any of the three aspects covered by Questions 1, 2 and 3, "the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict." *Chapman* v. *California* (1967), 386 U.S. 18 at 44. See also *Leary* v. *United States*, 395 U.S. 6, at 31, *Stromberg* v. *California* (1931), 283 U.S. 359.

The 5th Circuit Court appears to have come to a conclusion contrary to that reached below by the 9th Circuit Court, on the presumption of importation from possession. See *United States* v. *Matthews* (5 C.A., 1970), 427 F. 2d 992.

The charge was sustained despite the fact that the "significant percentage", "the not inconsiderable proportion" of marijuana that is home grown (*Leary*, supra, at p. 46 and p. 52) has been increased since the date of the *Leary* decision. See information given by John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, on April 3, 1970, to the Ninth Circuit Court and set out in its decision in *United States* v. *Avey* (9 C. A., 1970), 428 Fed. 2d 1159 from which we quote in part as follows:

> "• • • the premise set forth in footnotes 89 and 90 of the Leary case, with respect to not finding sizeable quantities of domestically grown marihuana in our illicit traffic, may no longer be true. We have received reports that many of the California traffickers have sent persons to the Central States to acquire marihuana from wild growth. It is significant to note that during 1969, there were over 150 persons arrested in Kansas alone for harvesting marihuana, most of whom were not residents of that State.
>
> "Although we have no precise computations as to what quantities are obtained from domestic growth, I am inclined to think that in view of recent trends we could not support the statement in the Leary case which concluded that 'Third and last, reports of the Bureau of Narcotics, and testimony of its agents indicate that in its far-reaching investigations the Bureau has never encountered a system of distributing sizeable quantities of domestically grown marihuana."

Moreover, since the decision in *Leary*, it has been made clear that the "beyond a reasonable doubt" standard of proof in criminal cases is constitutionally man-

dated. *In re Winship*, 397 U.S. 358 (1970). Here the charge failed to say that the inference had to be "beyond a reasonable doubt." For other possible infirmities of the presumption, see dissents by Black and Douglas, J.J. in *Turner* v. *United States* (1970), 395 U. S. 398.

Prescinding from the difficulty of formulating a proper instruction under the strict rule, and testing its substance in the light of the known fact respecting marijuana, that is to say, that a "significant percentage" (*Leary, supra*), "sizeable quantities" (Ingersoll report, *supra*) are home grown marijuana, how could the presumption of importation from possession of *any particular marijuana* rise to a level beyond a reasonable doubt?

Again, if the possessors of a "not inconsiderable" proportion of domestically consumed marijuana must be taken "to know that their marijuana was *not* illegally imported" (*Leary*, supra, at p. 53), how can importation of a particular lot of marijuana ever be presumed to a moral certainty? The presumption, for failing to meet the reasonable doubt test, has been challenged even in cocaine cases. *United States* v. *Gonzales* (2 C. A., 9-16-70), —— F. 2d ——, footnote 7 in dissenting opinion of Kaufman, Circuit Judge.

(ii)

On Questions 2 and 4

There is no doubt that in his charge (quoted, *supra*, p. 6), the Trial Judge placed upon defendants the obligation to present the marijuana at the port of entry for inspection with an invoice and a declaration under oath. This is clear from counsel's objection to the charge made without any rejoinder from the Judge, as follows:

> "Both defendants would further object to the Court's instruction as to the definition of mari-

> juana, brought into the country contrary to law, there being a requirement that the defendants make declaration under oath of the existence of marijuana and further file an invoice and declaration with the Customs agents as to the fact they have the marijuana in their possession, as further being violative of the Fifth Amendment of the United States Constitution and improper under the recent case of U. S. v. Leary." (R.T. 384-385).

If any statute or customs regulation put on defendants the obligation of filing a sworn declaration regarding marijuana, as the Court charged, under penal sanction for failure to comply, the statute or regulation would violate defendants' Fifth Amendment right against compulsory self-incrimination. This is the holding of *Leary, supra,* 395 U. S. 6, Part 1, at pp. 12-29. See also *Marchetti* v. *United States* (1968), 390 U. S. 39; *Grosso* v. *United States* (1968), 390 U. S. 62; and *Heynes* v. *United States* (1968), 390 U. S. 85.

The instruction, thus, is unconstitutional in two respects: first, in placing upon defendants a duty to act so as to incriminate themselves at the border; and second, in allowing the jury to presume from their possession of the marijuana that they had violated such duty and therefore had the necessary intent (under §176a) to defraud the United States by intending "to defraud it out of compliance with its Customs laws."

The error is compounded by the fact that the crime charged in substance was not smuggling but "illegal concealment and transportation" (see opinion below, App. A, *infra,* p. 1a), and the Court's instruction virtually presumes that petitioners were the actual "importers", if any, a fact wholly unsupported by the evidence. Aside from its unconstitutionality then, the charge had no place in this trial.

(Si)

On Question 5

The test for probable cause was stated in *Henry* v. *United States* (1959), 361 U.S. 98, at p. 102:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed * * *."

We have set out, *supra*, pp. 7-13, all the facts known to the Government when the car was first stopped and the car interior, the glove compartment and appellants' luggage were searched. The determination whether these facts constitute probable cause or not, is essentially a matter that Judges determine for themselves out of their own experience and background.* There is no easy answer. Nor has there ever been any ready agreement. Thus, on this very issue of probable cause or no probable cause, in *Carroll* v. *United States* (1925), 267 U.S. 132, McReynolds and Sutherland, J.J.., dissented; in *Brinegar* v. *United States* (1949), 338 U.S. 160, Jackson, Frankfurter and Murphy, J.J. dissented; in *Draper* v. *United States* (1959), 358 U.S. 307, Douglas, J. dissented; in *Beck* v. *Ohio* (1964), 379 U.S. 89, Clark and Black,

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* Note comments of Marshall, Chief Justice, in *Mitchell* v. *United States*, 9 Pet. 711, 723 (1835); Cardozo, *The Nature of the Judicial Process*, 11-13; and see Woolsey, D.J. in *United States* v. *One Book called "Ulysses"*, 5 F. Supp. 182 (S.D. N.Y. 1933).

> "The risk involved in the use of such a reagent [reasonable men test] arises from the inherent tendency of the trier of facts, however fair he may intend to be, to make his reagent too much subservient to his own idiosyncrasies."

J.J. dissented. If any point were to be served thereby, this list of dissents could be enlarged indefinitely.*

In *Henry* v. *United States, supra,* the Supreme Court held that no probable cause existed in the following suspicious circumstances:

> "Federal officers were investigating a theft of whiskey from an interstate shipment. On the afternoon of the day following the theft, on the basis of a tip possibly connecting the defendant with an interstate theft, they observed the defendant with another man come out of a tavern, get into an automobile and drive by a circuitous route to an alley beside a residential premises and stop. The defendant got out of the car, went into the building and returned to the automobile with some cartons and drove away. The Federal agents attempted to follow but lost the car. However, later they saw the car again at the tavern. And, once more, the same pattern was repeated. On this occasion, when the defendant left the alley, the officers stopped the automobile searched the cartons and found not stolen whiskey, but stolen radios."

In *One 1958 Plymouth* v. *Pennsylvania* (1965), 380 U.S. 693, the fact that a car was "low in the rear, quite low" was held not to be probable cause to stop and search it on the ground that it was transporting liquor.

Other cases of highly suspicious circumstances, akin to those at bar, not rising to the level of probable cause are *Rios* v. *United States* (1960), 364 U.S. 253; *People* v. *Corrado* (1968), 22 N.Y. 2d 308; *Plazola* v. *United States*

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* See generally; Percival E. Jackson, *Dissent in the Supreme Court,* pp. 297-323 (Univ. of Okla. Press, 1969).

(9 C. A. 1961), 291 F. 2d 56; *Montana* v. *Tomich* (9 C. A. 1964), 332 F. 2d 987.

We respectfully submit that the facts at bar reached at the most to suspicion, and never constituted probable cause, at least not the degree of probable cause sufficiently persuasive to justify the agents in acting on their own without a warrant. See *Aguilar* v. *State of Texas* (1964), 378 U. S. 108, at 111.

(iv)

On Question 6

The Ninth Circuit Court has, we submit, erroneously treated the case at bar as within the ambit of *Carroll* v. *United States*, 267 U.S. 132 (1925); *Brinegar* v. *United States*, 338 U.S. 160 (1949); and *Chambers* v. *Maroney*, —— U.S. —— (June 22, 1970). (See opinion below, Appendix A, infra, p. 7a).

In *Carroll*, supra, the seized truck was in the act of speeding along the highway from Detroit to Grand Rapids with contraband whiskey. In *Brinegar*, supra, the bootlegger's car was pursued at top speed for a mile along a road in northeastern Oklahoma before seizure. In *Chambers*, supra, the seized car had shortly before sped away from a gun-point holdup of a gas station.

At bar the car, after surveillance for several hours, was immobilized at a motel on the morning of October 1, 1968, from 1:15 a.m. to about 9 a.m. The three customs agents had obtained by 1:15 a.m. all the information they ever obtained respecting the car and its occupants. Their probable cause (assuming they had any) was complete at that moment. The car occupants, petitioners here, had, to the agents' knowledge (8-12), retired and left a call for 9 a.m. The agents at that point had made up their minds

to follow and stop the car on the road after it left the motel in the morning (testimony of Agent Dennis, Preliminary Hearing, p. 39). Thus the exigency that may exist in the case of a vehicle on the move did not really exist here. At best the appearance of exigent circumstances existed and that appearance was deliberately created by the agents themselves. See *Vale* v. *Louisiana* (1970), —— U.S. ——: "We decline to hold that an arrest on the street can provide its own 'Exigent circumstance' so as to justify a warrantless search of the arrestee's house."

The situation is somewhat akin to that visualized in the recent *United States* v. *Free*, CADC, —— Fed. 2d —— (8/12/70). There, in following the *Chambers* rule, the Circuit Court observed:

> "Probable cause for the search did not arise, until the police discovered appellant driving the getaway car only forty-five minutes after the assault. Thus this is not a case where prior to the search the police had both the information on which a warrant could have been issued and the time to obtain that warrant. As in Chambers the only way in which a warrant could have been obtained was by temporarily seizing the automobile and immobilizing it."
>
> • • •
>
> "It merits mention that neither our opinion nor *Chambers* considers the issue of probable cause for search that is foreseeable in advance."

At bar the agents had the information in adequate time to obtain the warrant, that is to say *nine hours* in advance of the seizure.

The obtaining of a warrant is not merely, as the Circuit Court said in its opinion (Appendix A, infra, p. 6a):

"the better practice." It continues to be a constitutional *requirement*, absent exigent circumstances, as *Chambers* v. *Maroney*, —— U.S. —— (June 22, 1970), makes clear. Agents may not avail themselves of an appearance of exigent circumstances that they themselves create. On the contrary, *Chimel* v. *California* (1969), 395 U.S. 752, criticizes the analogous police practice of waiting to execute an arrest warrant until the arrestee is at home, in order to ransack his home as an incident to his arrest.

Again, the Court of Appeals, to support its opinion, relies upon mere speculation saying (Appendix A, infra, p. 7a): "The early hour of the morning might have made it impossible to obtain the warrant." If the officers had tried unsuccessfully to get a warrant, something might be said in that regard. But they never applied and never intended to apply. In truth, they deliberately decided at 1:15 a.m. not to apply, but to allow the car to depart and to stop it on the road. It is crystal clear that time and circumstance permitted the obtaining of a warrant, or at the very least, an effort to apply for one during the intervening nine hours.

Nor, as the Court suggests, is any disclaimer possible by the agents that the situation from their position was "entirely different" (Appendix A, infra, p. 7a). So sure were they that the car was to be immobilized until 9 a.m. that they completely discontinued their surveillance, went home to sleep, and left the car and the petitioners unguarded and unwatched for at least one hour (18).

(v)

On Question 7

"Historically viewed, the Eighth Amendment was adopted to prevent inhuman, barbarous, or torturous punishment, though long-term imprisonment could be so

disproportionate to the offense as to fall within the inhibition." *Hemans* v. *United States* (6 C.A. 1947), 163 F. 2d 228, at 237; cert. den. 332 U.S. 801, rehearing den. 332 U.S. 821.

Necessarily, the "cruelty", the "unusualness" of punishment is a fluctuating concept changing with the changing mores of society. Thus, it is from the viewpoint of modern society that a five-year prison term for a marijuana offense should be judged. See *Weems* v. *United States* (1910), 217 U.S. 349 at 373; *Ex Parte Pickens*, 101 F. Supp. 285 (Terr. of Alaska, 3rd Div. 1951).

The following are a few instances reflecting present-day society's opinion of marijuana and of the five year minimum imprisonment. Life Magazine reports that an estimated 12 million people have now tried it. [Life, 10/31/69, *Marijuana: The Law vs. 12 Million People* at p. 27 *et seq.*] See also the companion article by Dr. James L. Goddard, former director of the U.S. Food and Drug Administration, *Life* 10/31/69, at page 34 where he states: "Our laws governing marijuana are a mixture of bad science and poor understanding of law as a deterrent force. They are unenforceable, *excessively severe*, scientifically incorrect and revealing of our ignorance of human behavior" (Emphasis added). In the *New York Post*, 10/27/69, at page 1, anthropologist Margaret Mead was quoted as saying before a Senate Committee: "If I were young today, I'd be using it."

Respecting a bill introduced by Senator Dodd the following comment was made: "As for penalties, the bill follows the recommendation by former Bureau of Prisons Director James Bennett before the Dodd committee that Congress eliminate 'the universally odious' and 'self-defeating' mandatory minimum penalties for drug and marijuana violations." [6 Cr. L. 2036—1/8/69].

A first offender minimum sentence of five years' imprisonment without the possibility of suspension or probation and, in some cases, lacking even the possibility of parole, seems to us to be a sentence equal to or more severe than that imposed for most violent crimes.

(vi)

On Question 8

At the conclusion of the Government's case, counsel for appellant Holland moved to dismiss the charge against him because there was insufficient evidence that he was in constructive possession of the marijuana seized from the locked trunk (R.T. 302-312). The motion was denied (R.T. 317).

Whatever evidence there was against Holland is set out in the suppression hearing testimony* recited, *supra*, pp. 7-13; at the trial it was further shown that he and Sherman had consecutively numbered Mexican visas on their passports showing a trip to Mexico on September 27, 1968 (Exhibits 2 and 2-A; see R.T. 166). It should be added that there was no proof that the defendants had brought marijuana across the border.

On the other hand, it is quite clear that Sherman alone rented the car; that Sherman was the only one seen to have or use a key to the car; that the marijuana was found in the locked truck of the car with Sherman's palm print on it. There was no evidence that the trunk was ever opened in Holland's presence, and there is no evidence that Holland was ever seen to drive the car.

At bar, Holland's alleged constructive possession of the marijuana, triggered the Trial Court's charge re-

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* In this respect the testimony on the suppression hearing was substantially the same as at the trial.

specting the presumptions heretofor discussed. The Ninth Circuit Court which affirmed the conviction here, has itself stated elsewhere, *Julian* v. *United States* (9 C.A., 1968), 391 F. 2d 279 at 280:

> "But where convicting presumptions are projected on possession, the evidence of possession ought to be very clear to satisfy the test of guilt beyond a reasonable doubt."

See also *Murray* v. *United States* (9 C.A., 1968), 403 F. 2d 694.

There was no proof that Holland had possession. Respecting constructive possession there was no proof that he had any power, physical or moral, to control or dispose of the marijuana locked in the car trunk.

(vii)

On Question 9

Immediately prior to the commencement of the second trial, a motion for severance on behalf of the defendants was made when it was disclosed by the U.S. Attorney that evidence would be presented that the driver of the automobile, defendant Sherman, had left a palm print on one of the wrappings of the seized marijuana. It was made clear such evidence involved only Sherman, and that there was no such evidence against Holland.

Defendant Holland's counsel stated that he first heard of the print only several days before the trial and defendant Sherman's counsel stated that he first heard of it only a few minutes before the trial commenced. The Court stated that he did not see how the joint trial would be prejudicial and denied the motion (R.T. 3-24).

The denial of severance was highly prejudicial to each of the defendants:

(a) With respect to Sherman: by compelling counsel for Holland to take a trial position that presumed Sherman was guilty; and

(b) with respect to defendant Holland; by creating the inference of guilt by association with Sherman and by the admission of the prejudicial palmprint in evidence against Sherman.

The effort by Holland and his counsel to turn all of the evidence against Sherman alone and to contrast Holland's innocent position with Sherman's was aggressively pursued and pervaded the whole trial.

The tactic was adopted by Holland's counsel, of subtlety incriminating Sherman because of the palm print and disassociating Holland from Sherman and the "venture" at every opportunity. For example:

> (Mr. Hirsch, Holland's counsel): "• • • what evidence is there of Richard Holland's possession • • •." (R.T. p. 335).
>
> "• • • where are his fingerprints on the knapsack • • •" (R.T. 340).
>
> "• • • This is how you prove possession. • • • you prove it by a palm print • • •" (R.T. 347-48).

Other like instances abound: E.g. R.T. 332-3; 334-9; 340; 343; 347; 350.

(viii)

On Question 10

When the jury at the first trial reported itself hopelessly deadlocked (Appendix G, *infra*), this was at the very least a demonstration that twelve men could not find defendants guilty beyond a reasonable doubt; and the ready acceptance of this report and prompt dis-

charge of the jury by the Trial Court after the jury had deliberated only six hours, implies for us also the Court's opinion of the weakness of the prosecution's case, on which, incidentally, the defense had rested.

In the circumstances, subjecting defendants to a second trial has violated their Fifth Amendment protection against double jeopardy. See *State* v. *Garrigues*, 2 N.C. 276 (1795), where it was held:

> "In the present case the jury were suffered by the Court's officer to separate without giving a verdict. As they could not agree to convict it is strong evidence of the party's innocence; and perhaps he could not be tried again with the same advantage to himself as then. Perhaps his witnesses are dead, or gone away, or their attendance not to be procured or some accident may prevent their attendance. We will not again put his life in jeopardy more especially as it is very improbable we shall be able to possess him of the same advantages."

The foregoing quote has been cited with approval in the dissenting opinions of Vinson, Ch. J. and Douglas, J., in *Brock* v. *State of North Carolina*, 344 U.S. 424 (1953), (which involved not a hung jury but a mistrial declared by the Court).

While the facts of *Green* v. *United States*, 355 U.S. 184 (1957) are not in point, since the first trial there resulted in conviction for a lesser offense rather than as here, in a hung jury, the rationale of *Green* against retrial on the greater offense after appellate reversal, applies here with all its vigor:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurispru-

> dence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green, supra*, at p. 187).

Given the presumption of innocence guaranteed by the constitution, the emphasis must be upon the government's burden of proving a defendant's guilt to twelve jurors. No burden is on the defendant to demonstrate his innocence unanimously. Anything less than a unanimous verdict of guilty must serve to exonerate a defendant. It must be taken to his benefit, not his detriment and should not permit the prosecution a "second bite at the apple" with a second panel of jurors. The rule is not twelve out of twenty-four but twelve out of twelve.

The embarrassment, expense, ordeal, anxiety, insecurity and possibility of being found guilty although innocent, continue to be fully present in the event of a jury disagreement, if it may be followed by one or more subsequent trials for the same offense.

The failure of a jury to agree on a verdict is not an "unforseeable circumstance", as suggested in *Wade* v. *Hunter*, 336 U.S. 684, at 688-689 (1949). It is the predictable result in any case where there is a lack of persuasive proof on the part of the prosecution. No distinction should be drawn between the prosecution's inability to present the evidence of a particular witness (*Downum* v. *United States*, 372 U.S. 734 (1963)), and its inability (as here) with full opportunity and no pro-

cedural barriers, to present sufficient evidence to persuade a jury of defendants' guilt beyond a reasonable doubt.

In *United States* v. *Jorn*, No. 19 on the 1970-1971 Calendar of this Court (restored for reargument 4-27-70, 38 L. W. 3421), the U. S. District Court, Utah, dismissed an information, on double jeopardy grounds, after the trial judge has declared a mistrial because he concluded that witnesses who had testified had not been adequately warned of their privilege against self-incrimination. Is that as good a reason for dismissal, as the failure of the government to present evidence sufficient to persuade a jury of guilt beyond a reasonable doubt?

We submit that the time has come when *United States* v. *Perez*, 9 Wheat. 579 (1824), and *Logan* v. *United States*, 144 U.S. 263 (1892) should be overruled and the rule espoused by Story, J., in *United States* v. *Gibert*, 25 Fed. Cas. 1287 (1834), should be restored, at any rate in cases of jury disagreement. See the eloquent argument in "Double Jeopardy Clause of the Fifth Amendment, A Case for Acquittal by Hung Jury." N. Y. Law Journal, p. 1 of September 30, 31 and October 1, 1970 by Arnold C. Streen.

In view of the decisions in *Benton* v. *Maryland* (1969), 395 U.S. 784, and *Price* v. *Georgia* (1970), 398 U.S. 323, applying the Fifth Amendment, through the 14th Amendment, in all its vigor to State action, the decisions in *Dreyer* v. *Illinois* (1902), 187 U.S. 71, and *Keerl* v. *Montana* (1909), 213 U.S. 135, appear to be no longer sound. However, they are inapposite here since they arose out of the State Court proceedings.

With respect to any claim of waiver for failure to raise the objection below, we submit that, in the face of the

prior decisions of this Court in *Perez* and *Logan, supra*, there could be no waiver. As this Court said in *Grosso* v. *United States* (1968), 390 U.S. 62 at 71, in a comparable situation:

> "Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this Court in *Kahriger* and *Lewis, supra*, which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB, supra*, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

See also *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130 at 143.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN
Attorney for Petitioners

On the Petition

WILLIAM T. GRIFFIN
JAMES J. DOYLE
PETER D. GRIFFIN

Dated: New York, New York
October 15, 1970.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNTIED STATES OF AMERICA,

Appellee,

v.

GERALD STANLEY SHERMAN and
RICHARD HENRY HOLLAND,

Appellants.

No. 24,731

[August 10, 1970]

Appeal from the United States District Court
for the District of Arizona

Before:

JERTBERG, CARTER and TRASK,
Circuit Judges.

TRASK, Circuit Judge:

Appellants were convicted by a jury of a violation of 21 U.S.C. § 176a. (Illegal concealment and transportation of marihuana). On appeal they challenge the failure to grant a motion for the suppression of evidence. They also raise a number of constitutional claims. We affirm.

Appendix A

Motion to Suppress

A motion to suppress evidence was filed and a hearing on the motion was held pursuant to Rule 41(e) on November 12, 1968. The evidence taken at the hearing stated most favorably to the position of the government, *Cotton* v. *United States*, 371 F.2d 385, 388 (9th Cir. 1967), was obtained from two officers.

Mr. Everett H. Turner is a Customs Port Investigator who has been stationed at Nogales approximately five years.

Just after 10:30 p.m. on September 30, 1968, he received a call from Deputy Sheriff Bracamonte of Santa Cruz County, Arizona (Nogales). Bracamonte told Turner that he had talked to three young men west of Nogales on Masonic Drive near the hospital. One was a "hippie" type with long hair and the other two had long hair but not excessively long; that he had stopped to offer assistance which was refused; that they told him they had been out watching the stars and that they had a car at Denny's restaurant in Nogales.

The hospital described by the officer is approximately three miles west of Grand Avenue in Nogales. The international boundary at Nogales is a ten-foot chain link fence which extends about three and one-half miles west from Grand Avenue at which point it becomes a four-strand barbed wire fence some four to four and one-half feet high. There is a Mexican road on one side and an American road on the other. The hospital is located about one-half mile northeast of the point at which the boundary fence becomes a four foot barbed wire fence. Between this fence and the hospital is barren, open country.

Appendix A

The area described is a notorious area for the delivery of narcotics and has been for the five years Inspector Turner has been at Nogales. The visiting hours at the hospital are from 8:00 to 9:00 in the evening. He considered it significant that the three were hippie types because approximately 60% of the narcotics violators he arrests are hippie types. (R.T. p. 26 of Motion to Suppress).

After the sheriff's telephone call, Turner got up and drove into Nogales. On the way he received a call on his car radio from a Nogales police officer named De La Osa. De La Osa informed Turner that he had given assistance to three young men on Masonic Drive near the hospital. They told him they had been out rock hunting and that they had a car at Denny's restaurant. The officer asked them if they had friends in the area and they told him they did not, they were by themselves. He gave the trio a ride and let them out at Denny's restaurant. They went in and met two other men in a booth.

Turner established surveillance from a VFW parking lot situated on a high hill overlooking Denny's restaurant and radiophoned agents Clink and Dennis for assistance. At approximately 12:45 a.m. the appellants and one of the three unidentified men left the restaurant and got into a 1968 white Chevrolet Malibu parked at the Time Motel just directly south of the restaurant. Turner obtained the license number, requested a registration check through the Arizona Highway Patrol and learned within a few minutes that the car was a Hertz rental unit from Tucson International Airport. The car drove west on Masonic Drive and Turner alerted agents Clink and Dennis.

Appendix A

The car returned fifteen to twenty minutes later with the same three men in it. He noted the car "was noticeably lower in the rear." (T.R. p. 11). The three got out and went into Denny's where the other two unidentified men were waiting. Fifteen or twenty minutes later all came out, the three unidentified men drove off in a Volkswagon and appellants returned to their room numbered 22. Turner quit his surveillance at 4:00 a.m.

The next morning at about 10.00 a.m., responding to a radio call, Turner came upon appellants about four miles north of Nogales with agents Clink and Dennis. Turner opened the back door of appellant's car and noticed a strong smell of marihuana. He was told that appellants contended they had no key to the trunk. They were thereupon returned to Nogales with their car. A key was made, the trunk opened and three camping pack sacks were found containing 80 bricks or 150 pounds of marihuana. Turner then placed both appellants under arrest, issued Miranda type warnings and left.

Agent Clink's testimony substantiated and was complimentary to that of Turner. He joined Turner in surveillance and watched the appellants as they drove along Masonic Drive about 1:00 a.m., to the hospital entrance where they made a complete turn and drove back about 200 yards and stopped. At this point the car was about one-quarter mile from the international boundary. He heard a door open and close and then after a few minutes the car left toward Nogales where Turner picked up the surveillance at the Time Motel.

Surveillance was renewed by Clink about 5:00 a.m. At about 9:15 a.m. appellants left room 22 and placed two suitcases inside the rear of the car. The trunk was not opened. Appellants were followed about four miles north

of Nogales where they were stopped and the events related by Mr. Turner were corroborated. On the basis of the events which he related and the information he had obtained, Agent Clink testified that when he stopped the appellants on the highway, he believed they had marihuana in the trunk of the vehicle.

Neither a search warrant nor an arrest warrant had been obtained prior to the time the car was stopped and the search began. The trial court denied the motion to suppress. We agree.

This court held in *United States* v. *Selby*, 407 F.2d (9th Cir. 1969) at p. 242-3 that:

> "Probable cause at the time of arrest is determined by examining 'whether at that moment the facts and circumstances within their (the authorities') knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed. 2d 142 (1964)."

To the same effect is *Henry* v. *United States*, 361 U.S. 98, 102 (1959) where the Court said:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed . . ."

As the trial court pointed out, each significantly suspicious circumstance by itself might not suffice for probable cause. Combined, they are conclusive. The physical ap-

pearance of the three unidentified hippies with whom the appellants were meeting, the time of night, the notorious character of the smuggling zone where they were, the ridiculous and conflicting explanations by the three of "star watching" and "rock hunting" for their movements in this area and at this hour of the night were enough to arouse the suspicions of police officer De La Osa and Sheriff's Deputy Bracamonte who reported their findings to Turner, an experienced customs officer. His suspicions were immediately aroused to the point of setting up surveillance. He saw the appellants with one of the hippie type persons take their car to the smuggling area where the three had previously been observed. A car door slammed. The car returned and was noted to be riding visibly lower in the rear by both Turner and Clink. The car was a rental, especially attractive to smugglers because of seizure of a car when contraband is found in it. (R.T. Suppression Proceedings, p. 59). The statement of the three that they were alone and had no friends in the area whereas they were meeting with appellants—on the basis of this evidence and the inferences which experienced officers and customs officials could draw from it, we cannot say that probable cause for the search did not exist.

Failure to Obtain Warrant

Appellants further contend that even though probable cause existed, the circumstances were not present to justify a search and seizure without a warrant. *Jones* v. *United States*, 357 U.S. 493, 499 (1958); *Jeffers* v. *United States*, 342 U.S. 48, 53 (1951).

If time and circumstance permits, certainly the better practice would be to obtain a search warrant. *Chimel* v.

California, 395 U.S. 752 (1969). As a matter of hindsight it might appear that both time and circumstance did possibly permit. Viewed from the position of the officers, the situation was entirely different. They did not know how the case would unfold. Three other men had been with the two under surveillance. They might return and others with them. The early hour of the morning might have made it impossible to obtain the warrant. In any event, exercising their best judgment, the officers waited until the car was in motion along the highway before they felt the time was ripe to stop it and search. Given the probable cause which existed as of this time, we do not believe that the search was a Fourth Amendment violation. *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925). Nor does the fact that a portion of the search which had begun on the highway, was necessarily continued to a short time later to permit examination of the trunk, change the legal search to an illegal one. Nor was it dependent for its validity upon the arrest which was later made. *Chambers* v. *Maroney*, U.S. (June 22, 1970).

THE PRESUMPTIVE INSTRUCTION UNDER 21 U.S.C. 176a

The second major issue urged by appellants is the alleged error of the district court in instructing the jury under 21 U.S.C. 176a. Appellants rely on *Leary* v. *United States*, 395 U.S. 6 (1969). Here, however, the court did not instruct the jury that from possession might be inferred knowledge of illegal importation. It was this presumed knowledge which was proscribed by *Leary*. The validity of the illegal importation inference was expressly left open. *Leary, supra*, at 37. It has recently been sus-

tained by this court. *United States* v. *Avey and Dean*, F.2d (June 10, 1970). See also *United States* v. *Adams*, 293 F. Supp. 776 (S.D.N.Y. 1968). The rational connection between established facts and presumed fact here are even stronger than in *Avey and Dean, supra*.[1] We find no error in the instructions.

OTHER CLAIMED ERRORS

Appellants also assert that the penalty under 21 U.S.C. 176a amounts to cruel and unusual punishment. This argument has been rejected in *Bettis* v. *United States*, 408 F.2d 563, 569-70 (9th Cir. 1969).

The motion for severance was denied and appellants assert error. The matter of severance is within the dis-

[1] The appellants had obtained the vehicle by rent from Herts at Tucson International Airport; they had travelled to Mexico on September 27, 1968, as appeared from the visas in evidence; the car had presumably been searched on reentry; the contraband in large quantities was found in the automobile four miles north of the Mexican border on October 1, 1968; the car had been under almost constant surveillance since 10:30 p.m. September 30, 1968; the marihuana was packaged and wrapped characteristically of that coming from Mexico; there was FBI evidence that a palm print of the appellant Sherman was found on one of the marihuana wrappings; Mexico is a known principal source of supply of illegally imported marihuana; there could be no reason to import that much marihuana into Mexico from the United States; the car was headed north and away from Mexico and into the United States when stopped; there was no evidence of a known domestic supply for marihuana in the quantity at this location; finally, the suspicious and clandestine circumstances which occurred under the surveillance of the customs agents. All combine to make it "more likely than not" that the presumption of illegal importation is valid.

cretion of the trial judge. Rule 14, Fed. R. Crim. P.; *United States* v. *Meyer*, 404 F.2d 254, 255 (9th Cir. 1968), *cert. denied*, 394 U.S. 989 (1969). We find no abuse of discretion here.

Appellant Holland move to dismiss the charge against him because there was insufficient evidence of possession as to him. The court denied the motion.

We have reviewed the instructions given on possession and constructive possession and find that those instructions were correct. No contention is made in the briefs of appellants to the contrary. The same is true with respect to the instruction on circumstantial evidence. The evidence was sufficient to warrant the instruction and justify a finding by the jury that Holland was in constructive possession and guilty of the offense charged. *Eason* v. *United States*, 281 F.2d 818 (9th Cir. 1960).

The judgment is affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Appellee,

v.

GERALD STANLEY SHERMAN and RICHARD HENRY HOLLAND,

Appellants.

No. 24731

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 10, 1970

APPENDIX C

Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NO. 24731

UNITED STATES OF AMERICA,

—against—

GERALD STANLEY SHERMAN and RICHARD HENRY HOLLAND
PETITION FOR REHEARING BY THE COURT AS CONSTITUTED IN THE ORIGINAL HEARING OR EN BANC, OR IN THE ALTERNATIVE FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit, JERTBERG, CARTER, and TRASK, *Circuit Judges*:

The decision of this Court affirming the judgment of conviction below, was rendered August 10, 1970.

Appellants respectfully petition this Honorable Court for a rehearing of the appeal by the Court as constituted in the original hearing or *en banc*, to submit once again the argued position on the points of the appeal, and particularly to call the Court's attention to the following:

Appendix C

(1)

The Customs Agents' Failure to Obtain or Apply for a Search Warrant

This Court has, we submit, erroneously treated the case at bar as within the ambit of *Carroll* v. *United States*, 267 U.S. 132 (1925); *Brinegar* v. *United States*, 338 U.S. 160 (1949); and *Chambers* v. *Maroney*, —— U.S. ——, (June 22, 1970).

In *Carroll*, supra, the seized truck was in the act of speeding along the highway from Detroit to Grand Rapids with contraband whiskey. In *Brinegar*, supra, the bootlegger's car was pursued at top speed for a mile along a road in northeastern Oklahoma before seizure. In *Chambers*, supra, the seized car had shortly before sped away from a gun-point holdup of a gas station.

At bar the car, after surveillance for several hours, was immobilized at a motel on the morning of October 1, 1968, from 1:15 a.m. to about 9 a.m. The officers at 1:15 a.m. had all the information they ever obtained respecting the car and its occupants. The occupants, to the officers' knowledge (8-12), had retired and left a call for 9 a.m. The officers at that point decided to follow and stop the car on the road when it left after 9 o'clock a.m. (testimony of Agent Dennis, Preliminary Hearing, p. 39). Thus, exigent circumstances did not really exist here, but the appearance of exigent circumstances was deliberately created by the customs agents themselves.

The obtaining of a warrant is not merely, as this Court phrased it on p. 5, lines 4-5 of its opinion, "the better practice." It continues to be a constitutional *requirement*, absent exigent circumstances, as *Chambers* v. *Maroney*, —— U.S. —— (June 22, 1970), 38 LW at 4569, the latest

decision, makes clear. Our research has found no decision that holds that agents may avail themselves of an appearance of exigent circumstances that they themselves create. On the contrary, *Chimel* v. *California*, 395 U.S. 752 at 767 (1969) criticizes the analogous police practice of waiting to execute an arrest warrant until the arrestee was at home, in order to ransack his home as an incident to the arrest.

Again, the Court, to support its opinoin, relies upon mere speculation saying: "The early hour of the morning might have made it impossible to obtain the warrant." If the officers had tried unsuccessfully to get a warrant, something might be said in that regard. But they never applied and never intended to apply. In truth, they deliberately decided at 1:15 a.m. not to apply, but to allow the car to depart and to stop it *in transitu*. It is crystal clear that time and circumstance permitted the obtaining of a warrant, or at the very least, an effort to apply for one during the intervening nine hours.

Nor, as the Court suggests, is any disclaimer possible by the agents that the situation from their position was "entirely different". So sure were they that the car was to be immobilized until 9 a.m. that they completely discontinued their surveillance (18).

This constitutional problem, i.e. the requirement of a search warrant even in the case of moving vehicles, accosted on the road but then immobilized, has not been put to rest by *Chambers*, supra. This is evident in the irrefutable logic of the dissenting opinion by Mr. Justice Harlan in that case. Why, then, apply the rule, as the Court has now done, to the instant case which does not really involve a moving car?

Appendix C

(2)

The Trial Court's Charge on Presumption of Illegal Importation from Possession

Respecting illegal importation of marijuana, the validity of the presumption in 21 U.S.C. §176a was left in question both on a "more likely than not" standard, *Leary* v. *United States* (1969), 395 U.S. 6, 23 L. Ed. 2d at p. 82, as well as the more exacting "beyond a reasonable doubt" standard, *Leary*, supra, 23 L. Ed. 2d at p. 82, footnote 64. The question was continued unanswered (respecting cocaine) in *Turner* v. *United States*, —— U.S. ——, 90 S. Ct. 653, where application of the "more likely than not" standard resulted in a negative answer and a reversal of the conviction below.

For two of the Justices in *Turner* (Mr. Justices Black and Douglas) the conviction below, based on the presumption, violated eight separate constitutional rights of the defendants (*Turner*, supra, 90 S. Ct. at p. 657).

The problem at bar is not solved by referring, as the Court has done (p. 5 of its opinion and footnote 1 thereto), to the strength of the established *facts* (apart from the presumption) from which the jury might have found illegal importation. The case was not given to them on that basis alone. The charge on presumption was excepted to, and if erroneous, reversal must follow even though "there was ample evidence apart from the presumption to sustain the verdict" *Chapman* v. *California*, (1967) 368 U.S. 18, 17 L. Ed 2d at 721.

So much marijuana is home grown that the presumption of knowledge of illegal importation from possession has been held not valid, even on the "more likely than not" standard. *Leary*, supra, 23 L. Ed. 2d at p. 83. How then

can one say the presumption of illegal importation itself (which is one step closer in the reasoning process) is valid on a "more likely than not" standard, not to mention on a "beyond a reasonable doubt" standard?

As to Staying the Mandate and Continuing Bail Pending Application for Certiorari to the Supreme Court

In the event this Court should deny rehearing, appellants intend to present to the United States Supreme Court a petition for a writ of certiorari to review the determination of this Court. It is respectfully prayed that the mandate of this Court be stayed until the determination of said petition so to be filed, and that pending such determination the appellants be continued on bail.

Two Questions to be Presented in a Petition for Certiorari

The two issues above discussed, as well as the other points of the original brief are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court. On the first of the two issues, the application of the *Carroll* rule to the car here involved, is highly questionable. The second of the two issues, the validity of the presumption of §176a, has been expressly left open by the Supreme Court and we believe it is ripe for determination and must be determined in this case.

The two questions above referred to are, we further submit, important enough to be reheard by this Court en banc.

Defendants Sherman and Holland were each sentenced to a five-year term and each is at liberty on bail of $10,000. Both defendants have always been available when

ever their presence was required and are without criminal records other than this case.

In view of the foregoing facts we respectfully request that the mandate be stayed and bail be continued pending determination of the certiorari proceeding.

No prior application for the relief prayed for herein has been made.

For the reasons set forth, this petition for rehearing on in the alternative for a stay of the mandate and a continuance of bail, should be granted.

Respectfully submitted,

JAMES J. DUNN,
Attorney for Defendants-Appellants
Office and P.O. Address:
161 William Street
New York, New York 10038
Telephone: 962-5442

WILLIAM T. GRIFFIN
Of Counsel

Dated: New York, New York
August 26, 1970

APPENDIX D

Order

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24,731

UNITED STATES OF AMERICA

Appellee,

v.

GERALD STANLEY SHERMAN and RICHARD HENRY HOLLAND

Appellants.

Before: JERTBERG, CARTER *and* TRASK, Circuit Judges.

The panel, as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED AND ENTERED SEPTEMBER 29, 1970.

APPENDIX E

Table of Rules, Statutes and Constitutional Provisions

Fed. Rules of Crim. Proc.

Rule 41(d)

Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner, shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Rule 41(e)

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything

so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statutes

18 U.S.C. § 1405. *Issuance of search warrants—procedure*

In any case involving a violation of any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code, a violation of subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec 174), or a violation of the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a).

(1) a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist, and

(2) a search warrant may be directed to any officer of the Metropolitan Police of the District of Columbia authorized to enforce or assist in enforcing a violation of any of such provisions.

21 U.S.C. §176a. *Smuggling of marihuana; penalties, evidence; definition of marihuana*

Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States imports or brings into the United States marihuana contrary to law or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Appendix E

Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

26 *U.S.C.* §7237(d). *No suspension of sentence; no probation; etc.*—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty of which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

28 *U.S.C.* §452. *Courts always open; power unrestricted by expiration of session*

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding.

Appendix E

CONSTITUTIONAL AMENDMENTS

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX F

Notice of Motion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
INDEX No. 24731 (C-30296 TUC.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

GERALD STANLEY SHERMAN and RICHARD HENRY HOLLAND,

Defendants-Appellants.

Sirs:

PLEASE TAKE NOTICE that, upon the annexed affidavit of James J. Doyle, Esq., attorney for the above-named defendants-appellants, duly verified the 21st day of August, 1970 with the exhibits annexed hereto and upon the decision and judgment of this Court, entered on August 10th, 1970, and upon the indictment herein filed October 8th, 1968, and the transcript of record herein, docketed August 25th, 1969 as Record No. 24731, and upon all prior papers and proceedings herein, the undersigned will move this Court as a Term for motions to be held at the Courthouse, located in the Post Office Building, Seventh and Mission Streets, at San Francisco, California, on the 2nd day of September, 1970, at the opening of the Court on that date, or as soon thereafter as counsel can be heard, for an Order enlarging the time to file a petition for re-hearing

on behalf of the defendants-appellants, to the 16th day of September, 1970, and to stay the issuance of the mandate of the Court to such date, pending the filing of such petition for re-hearing and thereafter until the disposition of such petition for re-hearing in accordance with Rule 41 (a) of the Federal Rules of Appellate Procedure, and for such other further and different relief as to the Court may seem just and proper.

DATED: New York, N. Y.
August 20, 1970

Yours, etc.

s/ James J. Doyle
JAMES J. DOYLE
Attorney for Defendants-Appellants
Office and P. O. Address
161 William Street
New York, New York 10038
Telephone: Area 212 962-5442

To:

RICHARD K. BURKE, ESQ.
United States Attorney, District of Arizona
United States Courthouse
Tucson, Arizona

JAMES M. WILKES, ESQ.
Assistant United States Attorney
United States Courthouse
Tucson, Arizona

Appendix F

Robert J. Hirsch, Esq.
Messing & Hirsch, Esqs.
412 Transamerica Building
Tucson, Arizona 85701.

Filed
Aug 25 1970
Wm. B. Lucas, Clerk

So ordered

Orrel W. Trask
Judge

8/25/70

APPENDIX G

Colloquy from pp. 213-214 of Reporter's Transcript of minutes of the first trial, held March 18, 1969:

The Court: Call the jury

(The jury returns to the courtroom).

The Court: Mr. Foreman, has the jury been able to arrive at a verdict?

The Foreman: I'm sorry, Your Honor, we have had a hung jury.

The Court: Be careful you don't disclose anything about the way you stand or any information concerning your deliberations. I take it you have not been able to arrive at a verdict?

The Foreman: We have not come to a verdict.

The Court: Is it your belief that with further deliberations that a verdict will be possible in the case?

The Foreman: I'm sorry to say, no.

The Court: Do the balance of the jurors disagree with that? Do any of you feel that with further deliberations you could arrive at a verdict?

Since apparently none of you are of the opinion you are going to be able to agree there is no point —you have had the case now some six hours and there is no point in continuing the deliberations unless there would be some hope of a verdict. Consequently the Court at this time will declare a mistrial of the case and excuse you from further service. The jury is excused at this time.

(Jury retires from the courtroom).

Certificate of Service

I hereby certify that on this 15 day of October, 1970, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530, as counsel for the United States, the only other party to the appeal,

Dated N. Y., October 15, 1970.

WILLIAM T. GRIFFIN,
Counsel for Petitioners,
161 William Street,
New York, New York 10038.